THE ATTORNEY GENERAL OF TEXAS

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ATTORNEY GENERAL

Mr. Hunter T. Hillin
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Open Records Decision No. 481

Re: Whether Open Records Act, article 6252-17a, V.T.C.S., allows Dallas/Fort Worth International Airport Board to deny request submitted by unsuccessful applicant for employment for access to information concerning his application

Dear Mr. Hillin:

You have asked whether the Open Records Act, article 6252-17a, V.T.C.S., permits the Dallas/Fort Worth International Airport Board to deny a request for records concerning an application for employment with the board. The request was submitted by an attorney on behalf of the applicant, who was not hired. The documents that you wish to withhold are marked as Exhibit "C" and Exhibits "E" through "I."[1]

We first consider Exhibit "C." Included in this exhibit are documents containing credit history information, provided by a bank, concerning both the applicant and his wife; documents submitted by previous employers, which contain information concerning the applicant's employment history and opinions of his job skills; and

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1. Your letter states that, "[b]ecause he was not hired as a result of the application, [the applicant] has no special right of access to information by Section 3(a)(2) of the Act." The applicant would have no such right even if he had been hired, as the Open Records Act accords to public employees no special right of access to information in their personnel files. Open Records Decision No. 288 (1981).

reference letters. With respect to this exhibit, your letter states:

> The public disclosure of this information, in our opinion, would constitute an unwarranted invasion of personal privacy (Op. Atty. Gen. JM-260 (1984)) and would constitute an invasion of a common law privacy right with the person providing the information. The information would not be of legitimate concern to the public. Op. Atty. Gen. No. JM-81 (1983).

Section 3(a)(1) of the Open Records Act excepts from required disclosure "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." Your concern appears to focus solely on the constitutional and common law aspects of section 3(a)(1). You have claimed no other exception in the act as a basis for denying this request, and as we have previously observed, this office does not raise exceptions other than section 3(a)(1) on behalf of governmental bodies seeking to withhold information from the public. See, e.g., Open Records Decision Nos. 444 (1986); 325 (1982).

Your statements do not clearly reveal whose privacy interests would in your view be infringed by the release of Exhibit "C." It appears that your argument is that the disclosure of the information in this exhibit would violate the privacy rights of the people who furnished it to the board. If so, we disagree. Common-law privacy protects only "highly intimate or embarrassing" personal information. Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668, 683 (Tex. 1976). "Disclosural" privacy, an aspect of personal privacy protected by the United States Constitution, similarly applies only to "intimate" personal information. Open Records Decision No. 455 (1987) and cases cited therein. Exhibit "C" contains no intimate or embarrassing personal facts about the people who supplied its contents to the board.

As noted, however, this exhibit contains information concerning the financial affairs of the applicant and of his wife. It indicates how long a particular bank has maintained credit history information on these individuals, the highest credit extended to them, their payment habits, the total loan balances, and whether and in what manner the loans were secured. Courts have recognized a

disclosural privacy interest in personal financial information. See, e.g., DuPlantier v. United States, 606 F.2d 654 (5th Cir. 1979); Plante v. Gonzalez, 575 F.2d 1119 (5th Cir. 1978), and cases compiled at 1124. The threshold question in this case is whether this financial information implicates a privacy interest. If it does, the next issue is whether a legitimate interest in its disclosure outweighs that privacy interest. See id. (applying balancing test to resolve disclosural privacy questions).

An examination of cases recognizing a constitutional privacy interest in personal financial information reveals that not all such information can be deemed "private." In Plante, for example, the court dealt with a Florida "sunshine law" requiring elected officials to disclose personal financial data. The court found that this data implicated a privacy interest, but that the statute was constitutional because this interest was outweighed by a public interest in the disclosure of the data. It is apparent that one factor that prompted the court to conclude that the officials had a privacy interest in the information in question involved its extensive and detailed nature: among other things, the statute required the disclosure of all sources of income, the location and description of Florida real estate holdings, the source of gifts in excess of $100, and all debts greater than the officials' net worth. 575 F.2d at 1122. The information involved in DuPlantier and in many of the cases cited in Plante was similarly detailed.

The financial information before us is not as extensive. On the other hand, we do not believe that information revealing a person's credit history, loan balances, payment habits, and collateral is so innocuous as to implicate no privacy interest, nor do we think that reasonable people would not object to the mandatory disclosure of this data. We conclude, therefore, that there is a privacy interest at stake here, albeit one of lesser magnitude that the interest involved in the cases cited above. We need not attempt to determine the extent of this privacy interest, because unlike the foregoing cases, there is in this instance absolutely no public interest in the disclosure of this information. That there is a privacy interest in this data but no public interest in its disclosure means that the data is constitutionally protected, notwithstanding that the privacy interest is less than that involved in Plante and Duplantier. In view of this, the applicant is not

entitled to examine Exhibit "C" to the extent that it contains personal financial information concerning his wife.

A different issue is raised by the documents in Exhibit "C" which contain financial information concerning the applicant. Your request letter is susceptible to the interpretation that the board may, solely on grounds of constitutional or common-law privacy, withhold these documents from the applicant. If this is your argument, we do not accept it. In our opinion, privacy theories are not implicated when an individual asks a governmental body to provide him with information concerning himself; since this is so, section 3(a)(1) of the Open Records Act, which authorizes governmental bodies to withhold information deemed confidential on privacy grounds, is not implicated. Where privacy is the sole basis on which a governmental body seeks to withhold information, the fact that section 3(a)(1) is not implicated means that no grounds for doing so exist.

In Billings v. Atkinson, 489 S.W.2d 858, 859 (Tex. 1973), the Texas Supreme Court said:

> The right of privacy has been defined as the right of an individual to be left alone, to live a life of seclusion, to be free from unwarranted publicity. 77 C.J.S. Right of Privacy §1. A judicially approved definition of the right of privacy is that it is the right to be free from the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities in such manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities. 62 Am. Jur. 2d, Privacy §1, p. 677, and cases cited.

In the Industrial Foundation case, supra, at 682, the court set out this quotation and then said:

> The above statement of the Court reveals that the tort 'invasion of privacy' is actually a recognition of several 'privacy interests' considered to be deserving of protection. Professor William L. Prosser

> has categorized these interests into four distinct torts, each subject to different rules:
>
> 1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
>
> 2. Public disclosure of embarrassing private facts about the plaintiff.
>
> 3. Publicity which places the plaintiff in a false light in the public eye.
>
> 4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

This discussion establishes that the purpose of privacy is to protect people from unwanted intrusions upon their personal lives by others and from the forced disclosure to others of intimate personal facts. Privacy interests, in other words, arise only in the context of a person vis-a-vis other individuals, and are not implicated where only the person himself is concerned. Only in the context of a relationship between an individual and someone else could any of the four privacy interests identified by Professor Prosser come into play. And only in this context is it logical to talk in terms of the "invasion of privacy" tort discussed in Industrial Foundation.

As noted, section 3(a)(1) is triggered by judicial decisions making information "confidential." The preceding discussion establishes that where an individual asks a governmental body to provide him with information concerning only himself, no constitutional or common-law privacy interest arises. If the governmental body can cite no other basis for denying the request, the fact that the request implicates no privacy interest means that neither section 3(a)(1) nor another section 3(a) exception is triggered by the request. This in turn means that the governmental entity lacks a permissible basis on which to deny the request. This is the case in this instance.

It has been suggested that our conclusion does not comport with Hutchins v. Texas Rehabilitation Commission, 544 S.W.2d 802 (Tex. Civ. App. - Austin 1976, no writ). In that case, the commission had denied a former patient's request for access to her own records. In the course of

concluding that the patient had a common-law right of access to these records, the court said:

> [T]he individual may not gain right of access and inspection based on special individual status, concern, or circumstances, rather than on status as a member of the general public.

Id. at 804. Hutchins is distinguishable, however, because there a statute made the requested records confidential. In effect, the court held that even though the records were within the scope of the statute and were thus protected by section 3(a)(1), the patient had a common-law right to obtain them. In this case, by contrast, no statute embraces the financial records sought by this requestor. We are, moreover, not holding that the requestor is, by virtue of "special individual status, concern, or circumstances," entitled to these records notwithstanding their section 3(a)(1) status; on the contrary, we hold that the common-law privacy aspect of section 3(a)(1) simply does not apply in this case. In a given case another exception could authorize withholding the information or the statutory confidentiality aspect of section 3(a)(1) could prohibit the disclosure of the information.

It has also been suggested that our conclusion violates section 14(a) of the Open Records Act, which provides:

> This Act does not prohibit any governmental body from voluntarily making part or all of its records available to the public, unless expressly prohibited by law; provided that such records shall then be available to any person.

Again, we disagree. Under the circumstances of this case, a decision by the board to give the applicant his own financial records would not be "voluntary"; as we have stressed, our conclusion is that the privacy aspect of section 3(a)(1) of the act does not embrace these records. Absent a claim that the records may be withheld from the applicant on some other basis, no section 3(a) provision excepts them, and the applicant is therefore entitled to them. The board, in other words, has no choice in the matter: legally, it must disclose these records to this

applicant, which means that it is not free "voluntarily" to do so.

A different issue would be presented if these records had been requested by someone other than the applicant. As our discussion about the applicant's right to obtain his wife's records shows, a privacy interest would arise in that case, section 3(a)(1) would be triggered, and the board would be obligated to deny the request. The denial of that request, however, would not be "voluntary" any more than granting of the applicant's request for his own records would be, because section 10(a) of the act prohibits the disclosure of "confidential" information. In either instance, therefore, section 14(a) would not be violated.

We finally note that the concept that privacy theories may not be invoked in a case such as this one is not novel. Section 3(a)(2) of the act provides that information in personnel files of a governmental body is protected from required public disclosure if its release "would constitute a clearly unwarranted invasion of personal privacy." But it then states:

> [P]rovided, however, that all information in personnel files of an individual employee within a governmental body is to be made available to that individual employee or his designated representative as is public information under this Act.

Although this exception confers on public employees no "special right of access" entitling them to all information in their files, Open Records Decision No. 288 (1981), its plain meaning is that personnel file information may not be withheld from the employee himself on the ground that its dislosure would constitute an unwarranted invasion of privacy. Section 3(a)(2) privacy, in other words, may be invoked only with respect to someone other than the employee. Section 3(a)(1) privacy, we conclude, functions in the same manner.

You also argue that the evaluations in Exhibit "C" are protected by section 3(a)(11) of the act. This exception allows governmental bodies to withhold advice, opinion and recommendation that plays a role in their decisionmaking processes. Austin v. City of San Antonio, 630 S.W.2d 391, 394 (Tex. App. - San Antonio 1982, writ ref'd n.r.e.); Open Records Decision No. 464 (1987).

Items five through ten in the reference forms submitted to the board by the applicant's previous employers may be withheld under this exception. These items discuss the applicant's "efficiency and personal hygiene," "attitude and loyalty," "initiative and attendance," "eligibil[ity] for rehire," whether he is "recommended for above position," and "personal comments." The remainder of these forms must be released. The personal reference letters may be withheld, as may the fifth and sixth items in the personal reference forms. These items are, "In your opinion, is applicant capable of performing various duties of Police and Fire Department assignments" and "Personal comments concerning applicant." The remainder of these forms must be released.[2] None of the forms containing financial information obtained from the bank may be withheld under section 3(a)(11).

We next consider Exhibit "E," which includes a polygraph examination of the applicant and a "telephone polygraph report," signed by the Captain of the Dallas/Fort Worth Airport Department of Public Safety, which summarizes the results of the examination. You contend that this exhibit is protected by sections 3(a)(8) and 3(a)(11) of the act and by section 19A of article 4413(29cc), V.T.C.S.

Section 19A provides in relevant part:

> (b) Except as provided by Subsection (d) of this section, a person for whom a polygraph examination is conducted or an employee of the person may not disclose to another person information acquired from the examination.
>
> (c) A licensed polygraph examiner, licensed trainee, or employee of a licensed

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2. Some forms contain statements that all information submitted will be kept confidential. For purposes of the Open Records Act, however, these statements have no effect. Governmental bodies may not keep information confidential simply because they have agreed to so do. See, e.g., Industrial Foundation of the South v. Texas Industrial Accident Board, supra; Open Records Decision No. 283 (1981).

> polygraph examiner may disclose information acquired from a polygraph examination to:
>
> (1) the examinee or any other person specifically designated in writing by the examinee;
>
> . . . .
>
> (d) A person for whom a polygraph examination is conducted or an employee of that person may disclose information acquired from the examination to a person described by Subdivisions (1) through (5) of Subsection (c) of this section. (Emphasis added.)

The board is a "person for whom a polygraph examination [was] conducted" within subsections (b) and (d). Compare Open Records Decision Nos. 430 (1985); 316 (1982) (reaching same conclusion regarding Department of Corrections and city of Pasadena). The applicant who seeks the results of this examination is one of the parties to whom the board "may" disclose that information. Thus, the issue here involves the meaning of the word "may." Must the board disclose this information to this applicant, or is it free not to do so?

The word "may" is generally regarded as permissive. District Grand Lodge No. 25 Grand United Order of Odd Fellows v. Jones, 160 S.W.2d 915, 922-23 (Tex. 1942). Only if it is clear that this word must be construed as mandatory to effectuate legislative intent will it be so construed. Id. In this instance, nothing in the language or legislative history of section 19A convinces us that a mandatory construction is required. We conclude, therefore, that section 19A permits, but does not require, examination results to be disclosed to examinees.

You have claimed that sections 3(a)(8) and 3(a)(11) embrace Exhibit "E." We believe that some information within this exhibit is within these exceptions. In our opinion, however, this portion of your request may be resolved on the basis of section 19A of article 4413(29cc). If "may" means that the board is permitted to, but need not, disclose this information to this applicant, the converse is necessarily true: if the board wishes to withhold this information, the statute empowers it to do so. Whether or not Exhibit "E" is protected by

some other section 3(a) exception, therefore, we conclude that its contents are in this instance protected by section 19A of article 4413 (29cc) and, in turn, by section 3(a)(1) of the act. Because the board has decided not to release this information, the information effectively becomes "confidential" within section 3(a)(1) and therefore need not be disclosed to anyone.[3]

Exhibit "F" contains a psychological evaluation of the applicant. You contend that sections 3(a)(8) and 3(a)(11) of the act and section 7A(2) of article 4413(29aa), V.T.C.S., apply to this exhibit.

Section 7A of article 4413 (29aa) provides that a person may not be licensed as a peace officer by the Commission on Law Enforcement Officer Standards and Education unless he is examined by a licensed psychologist or psychiatrist and is declared to be in satisfactory psychological and emotional health. Subsection 7A(2) of this section states that "[t]he psychologist's or psychiatrist's declaration . . . [is] not public information." In view of this, the information is confidential within section 3(a)(1).

Exhibit "F" consists almost entirely of opinion and recommendation of the psychologist who prepared the report. Reports prepared by outside consultants can under some circumstances constitute intra-agency memoranda within section 3(a)(11). Open Records Decision No. 192 (1978). Section 3(a)(11), therefore, authorizes the board to deny this request for this exhibit.

Exhibit "G" is an applicant check list which contains reasons for the applicant's denial of employment. You seek to withhold this exhibit under sections 3(a)(8) and 3(a)(11) of the act.

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3. In our privacy discussion, we observed that the situation would be different if, as in Hutchins, the claim was that the information was protected, not by constitutional or common law privacy, but by a statute. In that case, we said, the information could be withheld even from its subject. The information in Exhibit E fits within this rule.

Section 3(a)(8) excepts information if its release would "unduly interfere" with law enforcement or prosecution. Open Records Decision No. 434 (1986). Where it is not readily apparent that the release of particular records would likely have this effect, the governmental body claiming section 3(a)(8) bears the burden of showing why this would likely occur. Id.; Open Records Decision No. 287 (1981). We perceive no way in which the release of Exhibit "G" would hamper law enforcement or prosecution, and the board has made no showing to the contrary. Section 3(a)(8), therefore, does not apply.

One part of this exhibit is labelled "Recommendation." You indicate that this information played a role in the decisional process. This part may be withheld under section 3(a)(11). The remainder of the exhibit may not be withheld under this exception, as none of it consists of advice, opinion or recommendation.

Exhibit "H" is an applicant processing form which notes the agreement or disagreement of the board's directors with the recommendations in Exhibit "I." You wish to withhold this exhibit under sections 3(a)(8) and 3(a)(11). Applying the standards that we have discussed, we conclude that section 3(a)(11) embraces this exhibit. It consists entirely of recommendation.

Exhibit "I" summarizes the background check on the applicant. You wish to withhold it under sections 3(a)(8) and 3(a)(11).

We disagree with your assertion that this exhibit is "rife with conclusions and recommendations." On the contrary, only the underlined comment on the first page of the exhibit and the first sentence of the "Conclusion" section in page 4 contain "opinion" or "recommendation." These statements may be withheld under section 3(a)(11). The section which discusses the results of the psychological evaluation may be withheld for the reasons discussed previously. We find no information in this report, the release of which would unduly interfere with law enforcement or prosecution within section 3(a)(8).

Some information in Exhibit "I" might, on constitutional or common law privacy grounds, be excepted from required disclosure to third parties. As we have said, however, these theories may not be invoked to withhold this information from this requestor.

S U M M A R Y

Constitutional and common law privacy afford no grounds for denying a person's request for information concerning him. In this instance, the act authorizes the withholding of portions of Exhibits "C," "G," and "I." Exhibits "E,""F," and "H" may be withheld in their entirety.

Very truly yours,

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